1978

# Barbara Zito v. Gary Butler : Brief of Appellant

Utah Supreme Court

(6)

IN THE SUPREME COURT OF THE

STATE OF UTAH

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BARBARA ZITO,

Plaintiff and Respondent,

vs.

GARY BUTLER,

Defendant and Appellant.

Case No. 15493

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# BRIEF OF APPELLANT

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Appeal from the Judgment of the District Court of Weber County, Utah. Honorable John F. Wahlquist, Judge


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| Defendant and Appellant. | / | |

# BRIEF OF APPELLANT

## STATEMENT OF THE KIND OF CASE

This is an action in paternity brought by the Respondent against the Appellant, wherein the Respondent sought to obtain a Judgment finding the Appellant as the natural father of Shauna Zito, for reasonable expenses of Respondent, for past support, for future support, and for attorney's fees.

The Appellant filed an Answer alleging the affirmative defenses of statute of limitations, laches, waiver, and estoppel resulting from Respondent's failure to initiate this action seeking declaration of paternity against the Appellant.

Appellant seeks a determination as to whether or not the affirmative defenses of laches, waiver, and estoppel are permissible to the Respondent's Petition for a Declaration of Paternity, and for child support.

## DISPOSITION IN LOWER COURT

The Lower Court from a jury verdict in favor of the Respondent in its action for a Declaration of Paternity and for past and future child support, declared the Appellant to be the father of the minor child, and to remit the amount of past child support due and owing to the Respondent.

The Lower Court did further make an Order setting forth the amount of child support the Appellant would be required to pay to the Respondent on behalf of said minor child in the future.

## RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the Judgment and final Order of the Lower Court, which denied to the Appellant the right to assert the affirmative defenses of the statute of limitations, laches, waiver, and estoppel at time of trial.

## STATEMENT OF FACTS

The Respondent commenced an action on or about February 18, 1976, seeking a declaration against the Appellant as the putative

father of the minor child, Shauna Zito, born to the Respondent on September 2, 1971. (R-1)

The Appellant filed an Answer to the Respondent's Petition on or about March 12, 1976, wherein the Appellant did set forth the affirmative defense of the statute of limitations, the affirmative defense of laches, the affirmative defense of estoppel, in addition to denying paternity. (R-4,-5)

The Appellant did file a Motion for Summary Judgment on or about April 10, 1976, alleging that the affirmative defenses set forth in Appellant's Answer was dispositive of the issues before the Lower Court (R-10). The Honorable Calvin Gould denied the Appellant's Motion for Summary Judgment in a Memorandum Decision dated June 4, 1976, holding that the issue of paternity could be determined where the Respondent had commenced an action more then four years after the birth of the minor child. (R-23)

The matter came on regularly for trial on October 5, 1977, before the Honorable John F. Wahlquist, Judge, sitting with a jury.

## ARGUMENT

### POINT I

### DENIAL OF APPELLANT'S MOTION FOR SUMMARY JUDGMENT WAS ERROR.

The Honorable Calvin Gould did render a Memorandum

Decision on or about June 4, 1976, wherein he denied the Plaintiff's Motion for Summary Judgment stating an issue of paternity may be determined in this action.

The Supreme Court of Utah held that the passage of the Uniform Act on Paternity did not supersede nor impliedly repeal the Utah Bastardy Act, U.C.A., 1953, 77-60-1, et seq., in State of Utah v. Abram, 495 P.2d 313 (Ut., 1972). It, therefore, appears that there are two methods whereby a mother of an illegitimate child may seek a declaration of paternity and child support from the child's alleged natural father.

This Court also held in State of Utah v. Judd, 493 P.2d 604 (Ut., 1972), that the Bastardy Act and the Uniform Act on Paternity are substantially the same, except for the manner in which the proceedings are initiated.

This Court further stated in the Judd case, that:

> It appears therefrom an express intention upon the part of the legislature to retain the Bastardy Act, and there is no justification for determination, that the legislature intended to repeal the earlier Act...
>
> It is a rule of statutory construction, that where there are two or more statutes dealing with the same subject matter, they will be construed so as to maintain the integrity of both. Repeal by implication is not affected unless the terms of the later enacted law are irreconcilable with the former. (Citing McCoy v. Severson, 222 P.2d 1058 (Ut., 1950).

The Bastardy Act, U.C.A., 1953, 77-60-15, provides that no prosecution under this chapter shall be brought after four

years from the birth of such child. The Uniform Act on Paternity, U.C.A., 78-45A-1, et seq., does not set forth any statute of limitations upon which an action may be commenced, but, it does, however, provide in U.C.A., 78-45A-3, that a father's liability for past education and necessary support is limited to the four years next preceding the commencement of an action.

Therefore, it appears in following the Utah Supreme Court's rule of statutory construction as pronounced in State v. Judd, supra, where there are two statutes which relate to the same subject matter, as is true in the instant case, the Court will construe such statutes in a manner maintaining the integrity of both. The similarity of the Bastardy Act and Uniform Act on Paternity has been acknowledged in State v. Judd, supra, and Brown v. Marrelli, 527 P.2d 230 (Ut., 1974).

The two Acts being alternative remedies, involving like subject matter, both the Bastardy Act and the Uniform Act on Paternity should be given effect so long as the two Acts are not irreconcilable.

In Re People In Interest of L.B., 498 P.2d 1157 (Colo., 1972), the Colorado Supreme Court held where there is a specific statute setting forth a statute of limitations for paternity, that the issue of paternity cannot be adjudicated "as an adjunct"

of support proceedings where support proceedings are not commenced within the five-year (paternity) statute of limitations.

The Appellant submits that since the Utah Bastardy Act provides a four-year statute of limitations from the date of birth of the child and the Utah Uniform Act on Paternity provides that recovery from the father is limited to the four years next preceding the commencement of an action, the two Acts can be construed so as to maintain the integrity of both statutes by applying the four-year statute of limitations in actions brought under both Acts and by permitting the party seeking a declaration of paternity to recovery for past education and necessary support to the four years next preceding the commencement of the action, (a remedy not afforded under the Bastardy Act).

The Appellant distinguishes the present case from the holding of this Court in Martinez v. Romero, 558 P.2d 510 (Ut., 1976), wherein the issue presented to the Court was whether an action could be commenced pursuant to U.C.A., 78-45A-1 and 2, for past support and confinement and also an Order for future support to be sought under the Uniform Act on Paternity more then eight years after the birth of the child.

It appears to the Appellant that the Utah Supreme Court therein held, that an action not brought within eight years is barred by U.C.A., 78-12-22.

That U.C.A., 78-12-22, provides that:

78-12-22. Within eight years - Within eight years: Any action to enforce any liability due or to become due, for failure to provide support or maintenance for dependent children.

That U.C.A., 78-12-22, sets forth a statute of limitation which is more specifically referred to in U.C.A., 78-12-1, which provides that:

78-12-1. Time for Commencement of Action Generally - Civil actions can be commenced only within the period prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute.

This Court held in Seeley v. Park, 532 P.2d 684 (Ut., 1975), that the eight-year limitation of U.C.A., 78-12-22, applied to past due alimony and support.

However, the holdings of Seeley v. Park, supra, and Martinez v. Romero, supra, are distinguishable from the instant case, in that Seeley v. Park concerned child support pursuant to a Decree of Divorce and Martinez v. Romero only presented the issue, that a paternity action could not be commenced more then eight years after the birth of the child under the Uniform Act on Paternity and did not consider the affect of U.C.A., 78-12-1, on U.C.A., 78-12-22, in that such a consideration was unnecessary under the facts of that case.

It is submitted, that U.C.A., 77-60-15, which sets forth a four-year statute of limitations issue is within the "special cases" of U.C.A., 78-12-1, and precludes the Respondent from

proceeding against the Appellant in an action seeking a declaration of paternity more then four years after the birth of the child.

POINT II

REFUSAL OF COURT TO GRANT APPELLANT'S MOTION TO DISMISS AFTER RESPONDENT HAD RESTED HIS CASE IS ERROR.

That the Appellant, upon the Respondent resting his case, made a Motion to Dismiss on the basis that the Respondent had failed to set forth a prima facie case, in that there was no showing as to the gestation period and no showing as to when the Respondent did become pregnant (R-181,-182).

That while it does appear from the testimony of the Respondent, that Respondent was engaging in a sexual relationship with the Defendant in November, December of 1970, and January of 1971, and the Respondent further testified that:

Q. I see. Now, did there come a time, Barbara, when you discovered that you were pregnant or you thought you might be pregnant.

A. Yes.

Q. But when was that?

A. Probably in about January. (R-153)

The Respondent did further testify that she consulted a doctor around the 1st of March, 1971, and the Respondent was permitted over the objection of the Appellant to testify as to the results of the doctor's examination and that the Respondent was pregnant at that time. (R-154)

That the Lower Court erred in admitting such unsupported evidence, and said that:

> The Court: She may answer the question if the answer was given in the course of ordinary treatment.

That the Rules of Evidence as adopted by the Supreme Court of Utah, and particularly Rules 62 and 63, which define "hearsay" and the exceptions thereto, do not set forth an exception for treatments made during the course of ordinary treatment.

The California Supreme Court in Smith v. Heilman, 340 P.2d 752 (Cal., 1959), stated that:

> As above stated, in the present case the period of gestation was 188 or 190 days.

In Dazey v. Dazey 50 Cal.App.2d 15, at page 20, 122 P.2d 308 [at page 310], it was said in referring to a medical text book, that:

> "'It is customery to recognize a length of pregnancy as nine calendar months, or ten lunar months, 280 days duration, dating from the first day of the last menstruation period.'"

It was also said therein, 50 Cal.App.2d at page 20, 122 P.2d at page 310, that:

> This author also plainly states, that if we compute the period from fruitful coition to birth, [period gestation] there is from 220 days to 330 days.
>
> The attending physician, called as a witness by Defendant, testified that, in determining a date when a child will be born, the members of the medical profession count 280 days from the last menstrual period, but if they could actually know the date of fruitful coition, they would count

> the time of delivery from that date; that there is no cognizable in the medical profession, that the period of pregnancy range from 220 to 330 days; that there is no hard and fast rule limiting the periods of pregnancy; that he would not consider it an average case if a child were born 190 days after fruitful coition, but he would not say that it was an abnormal case.

Therefore, it is submitted that without testimony as to when the Respondent became pregnant and that she only suspected being pregnant in January, 1971, and the gestation period in this particular instance not being shown, the Appellant's Motion to Dismiss should have been granted, in that the jury would be required to speculate as to when the Respondent did become pregnant and such speculation should not be permitted where the Respondent could have produced testimony establishing the date of impregnation and that such impregnation did occur in November or December of 1970 and/or January 1971, those being the months the Respondent testified having sexual intercourse with the Appellant. (R-152,-153)

## POINT III

THE REFUSAL OF THE COURT TO INSTRUCT JURORS ON LACHES AND ESTOPPEL IS ERROR.

The Defendant requested three jury instructions concerning the defenses of laches, estoppel, and waiver, and the Court refused such instructions as submitted by the Defendant. (R-218)

The jury instructions on laches, estoppel, and waiver (R-89,-90,-91), are proper instructions and should have been submitted to the jury on the basis of the testimony of the Respondent, wherein the Respondent stated that:

Q. Okay. Mrs. Zito, after receiving this letter, no further action was taken, was it?

A. No, there was not.

Q. That was the end of the proceedings there, wasn't it?

A. Uh huh.

Q. You elected at that time not to proceed, didn't you?

A. Yes.

Q. You knew at that time you had the right to go after him, though.

A. You bet I did.

Q. For the same thing you are going after him for right now, didn't you.

A. Uh huh. (R-173)

The letter which is being referred to above is the letter written to Attorney Findley P. Gridley who was representing the Respondent in September, 1972, and this letter is the reply to the communication from Attorney Gridley to the Appellant seeking a declaration of paterntiy by the Appellant for the minor child. (Def.Exh.6)

It is submitted that the testimony of the Respondent

was such that the failure of the Court to instruct the jury on the defenses of laches, waiver, and estoppel was error, and that such defenses should have been submitted to the jury.

That the Supreme Court of Washington held in Buell v. City of Bremerton, 495 P.2d 1358 (Wash., 1972), that:

> The element of laches are: (1) knowledge of reasonable opportunity to discover on the part of a potential Plaintiff, that he has a cause of action against the Defendant; (2) An unreasonable delay by the Plaintiff in commencing that cause of action; (3) Damage to the Defendant resulting from the unreasonable delay. None of these elements alone raises the defense of laches. Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them.

Similarly, in Hanns v. Hanns, 423 P.2d 499 (Ore., 1967), the Oregon Supreme Court held, that laches is neglect for unreasonable and unexplained length of time under circumstances which would permit diligence to do in law what should have been done and which results in a disadvantage to the other party.

The Appellant testified, that had the Respondent proceeded in September or October of 1972, that his recollection as to dates and places concerning the paternity charge would be better. (R-188) Therefore, it is submitted that the long delay of the Respondent, when said Respondent knew that a proceeding could be instituted against the Appellant herein, resulted in a detriment to the Appellant, in that his ability to recollect dates and places diminished, and that the failure of the Respondent

to proceed on her claim in 1972 constitutes laches and the Respondent should be estopped from now proceeding against the Appellant.

## CONCLUSION

It is submitted to this Honorable Court, that the statute of limitations barred the Respondent from proceeding against the Appellant for a declaration of paternity, in that more than four years have elapsed from the child's birth until the action was commenced.

It is further submitted, that the Trial Court erred in not granting the Appellant's Motion to Dismiss, in permitting the Respondent to testify to matters which do not fall within the hearsay exception, and refusing to instruct the jury as to the defenses of laches, estoppel, and waiver in light of the testimony received by the Court.

Respectfully submitted this 17 day of January, 1978.

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CERTIFICATE OF MAILING

A copy of the above and foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondent, Francis M. Wikstrom, 9 Bank of Utah Plaza, Ogden, Utah 84401, on this 17 day of January, 1978.

Jeannine Stowell, Secretary